IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 7TH JUNE 2007 / 17TH JYAISHTA 1929

Crl.MC.No. 3298 of 2006(B)

CC.127/2005 of ADDL.CHIEF JUDICIAL MAGISTRATE COURT, THALASSERY

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PETITIONER: ACCUSED:

M.P.MUJEEB REHMAN, S/O.MUHAMMED,
THAZHATHIL PARAMBIL, NALLALAM, KOZHIKODE DISTRICT.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENTS: COMPLAINANT & STATE:

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1. SUB INSPECTOR OF POLICE,
KADIROOR POLICE STATION, THALASSERY, KANNUR.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. GIKKU JACOB

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 07/06/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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Crl.M.C.No. 3298 of 2006

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Dated this the 7th day of June, 2007

O R D E R

The petitioner is the 8th witness turn to second accused in a prosecution under Section 379 I.P.C.

2. To cut a long story short, the stolen vehicle was recovered by the police on the basis of the confession statement of the first accused from the possession of the second accused i.e. the petitioner herein. The police, in the course of investigation, had come to the conclusion that the petitioner herein was an innocent receiver of the stolen vehicle believing bonafide that the vehicle was that of the first accused. When the final report was submitted arraying the petitioner as the 8th charge witness, the learned Magistrate did not accept the same. It was returned to the police for further investigation. The police obtained opinion from the Prosecutor and the Prosecutor had opined that in the total absence of any material to indicate the complicity of the petitioner, he need not be arrayed as an accused and can be arrayed as a witness. The Prosecutor appears to have felt that

that would help the prosecution to prove the case against the first accused better also.

3. The learned Magistrate directed further investigation on receipt of the charge sheet. Later, after further investigation, the police again submitted a final report sticking to their stand that the petitioner need not be arrayed as an accused. It is at that stage that the learned Magistrate directed that cognizance be taken on such negative report (in that it did not implicated the petitioner) submitted by the police. Though the report was negative, the learned Magistrate thought that cognizance should be taken against the petitioner herein also.

4. The learned Magistrate felt that the negative report (negative as against the petitioner herein) need not deter him from taking cognizance against the petitioner and arraying him as the second accused transposing him from his earlier status as 8th witness. The learned Magistrate appears to have felt that powers under Section 319 Cr.P.C. are available to the Magistrate to resort to such a course.

5. The learned counsel for the petitioner first of all contends that the learned Magistrate had no jurisdiction to invoke the powers under Section 319 Cr.P.C. in as much as no evidence whatsoever had been adduced before the learned Magistrate. I find the said stand taken by the learned counsel

for the petitioner to be absolutely justified. Powers under Section 319 Cr.P.C. can be invoked only on the basis of the evidence placed before court. The negative final report submitted by the Investigating Officer or the materials therein could not have been reckoned as evidence for the purpose of Section 319 Cr.P.C.

6. When a Magistrate gets a final report under Section 173 or a further report under Section 173(8) Cr.P.C. three courses are certainly available to the Magistrate. He can agree with the conclusions of the Investigating Officer and take cognizance against the accused. Secondly, he can disagree with the conclusions of the Investigating Officer and proceed to take cognizance if materials are there in the final report to resort to such a course. The third option, of course, is to send the matter back to the Investigating Officer to conduct further investigation.

7. I have been taken through the case diary in detail. I have perused the report submitted by the learned Addl. Chief Judicial Magistrate, who had passed the impugned order. Except that the first accused had handed over the vehicle to the second accused and the second accused had produced the same before the police when they reached him on the basis of the confession statement of the first accused, there is no data whatsoever to

indicate the complicity of the petitioner herein. The materials available along with the final report only show that the petitioner had innocently received the same from the first accused.

8. The jurisdiction of the learned Magistrate to disagree with the opinion of the Investigating Officer and to take cognizance even on a negative report cannot be disputed. But certainly there must be materials in the final report to justify such course. In the facts and circumstances of this case, I find there is total absence of such material and it must in these circumstances be held that the action taken by the learned Magistrate of taking cognizance of the offences against the petitioner is not justified. Merely because the stolen article was handed over to the petitioner by the first accused and that he had confessed his guilt to the police and led them to the petitioner, the complicity of the petitioner cannot legally be assumed.

9. This Crl.M.C. is hence allowed. The impugned order arraying the petitioner as the second accused is set aside. Needless to say, this order will not stand in the way of the learned Magistrate invoking the powers

under Section 319 Cr.P.C. after recording the evidence if satisfactory materials emerges against the petitioner in such trial.

(R. BASANT)
Judge

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